



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 13, 1994

Mr. Charles Karakashian, Jr.  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR94-335

Dear Mr. Karakashian:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).<sup>1</sup> Your request was assigned ID# 23261.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, or explain how that exception applies, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The Texas Rangers Division of the Texas Department of Public Safety (the "department") received three open records requests for records pertaining to its 1984 investigations into the operation of the Travis County District Attorney's Office. The most inclusive of these requests seeks the following:

All documents and records including, but not limited to, electronically stored computer records, letters, lists, charts, reports, statements, correspondence, memos and checks ("Documents") relating to or concerning Messrs. Ronnie Earle and/or Tex Martin, including,

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<sup>1</sup>The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

without limitation, all Documents relating to any investigations or inquiries regarding either or both of Messrs. Earle and Martin in or about the years 1984 and 1985.

You have submitted to this office for review various exhibits, labeled D - L, which come within the ambit of the open records requests. We will discuss each of those exhibits, and the exceptions that you have raised for those exhibits, in turn.<sup>2</sup>

Exhibit D consists of an unserved federal search warrant authorizing the search of the Travis County District Attorney's Office and the accompanying probable cause affidavit. You state that your office has been informed by the Federal Bureau of Investigation (the "bureau") that these records are under the seal of a Federal District Court. This office has confirmed with the United States District Court - Western District that these records are still under seal. Section 552.107(2) of the Government Code requires that, where "a court by order has prohibited disclosure of the information," it must be withheld from public disclosure. Consequently, the department must withhold these records pursuant to section 552.107(2) for as long as the order sealing these records is in force. Cf. Open Records Decision No. 389 (1983) (protective order).

Exhibit E consists of a bureau report which relates to the subject matter of the issued but never served search warrant. Throughout the report are notices that state:

This document contains neither recommendations nor conclusions of the FBI. *It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.*  
[Emphasis added.]

In Open Records Decision No. 561 (1990), this office held that where a federal agency shares information with a governmental body in Texas pursuant to a policy affording the governmental body greater access to the information than that afforded to the general public, the governmental body must withhold that information pursuant to former section 3(a)(1) of the Open Records Act (now found at section 552.101 of the Government Code<sup>3</sup>). You inform us that the bureau has requested that the department not release the report, but rather that the bureau be served with a written request for the report so that the report's contents may be reviewed in light of the federal Freedom of Information Act, 5 U.S.C. § 552, and the federal Privacy Act of 1974, 5 U.S.C. § 552a.

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<sup>2</sup>In correspondence subsequent to your initial request for an open records decision you also seek to withhold all of the requested information pursuant to Government Code sections 552.103 (the "litigation" exception) and 552.108 (the "law enforcement" exception) "[d]ue to the re-indictment of Senator Kay Bailey Hutchison." You acknowledge, however, that "[t]he relationship between the investigations of Mr. Earle and Mr. Martin to the prosecution of Ms. Hutchison is admittedly tenuous at best." Because Ms. Hutchison's criminal trial has concluded, your arguments in this regard are now moot.

<sup>3</sup>Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

This office agrees that these federal laws govern the release of the report; consequently, the department must withhold the report pursuant to section 552.101.

Exhibit F is a series of police reports that the department obtained from a "confidential source" within the Austin Police Department. You state that the disclosure of these reports "would lead to the discovery of this confidential informant" and consequently "cut off this source of information and thereby unduly interfere with law enforcement." We construe your arguments for withholding the reports as implicating section 552.108 and the informer's privilege as incorporated in section 552.101.

Section 552.108, known as the "law enforcement" exception, excepts from required public disclosure:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . [; and]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement . . . .

Whether this exception applies to particular records depends on whether their release would "unduly interfere" with law enforcement or prosecution. Open Records Decision Nos. 434 (1986); 287 (1981). The primary purpose of the exception is to protect law enforcement and crime prevention efforts by preventing suspects and criminals from using records in evading detection and capture. See Open Records Decision Nos. 133, 127 (1976). Such interests clearly are not at stake here.

It is not apparent from either your brief to this office or the contents of Exhibit F the circumstances under which the department obtained these records. We note, however, that because it is the public policy of this state that governmental bodies, e.g., law enforcement agencies, should cooperate with each other in the interest of the efficient and economical administration of their statutory duties, the department would be authorized to obtain records such as these from the Austin Police Department for law enforcement purposes. See, e.g., Open Records Decision No. 183 (1978) at 5. Because the department should have been authorized to obtain these reports from the Austin Police Department, this office does not believe that the release of this information would unduly interfere with future cooperative efforts. Consequently, the department may not withhold these records from the public pursuant to section 552.108.

We also note that the requested information does not fall within the protection of the "informer's privilege" aspect of section 552.101. In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure *the identity of persons who furnish information of violations of law to officers charged with enforcement of that law*. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. [Emphasis added.]

The "informer's privilege" aspect of section 552.101 protects the identity of persons who report violations of the law. When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515 (1988); 191 (1978). The mere providing of these police records to the department does not in itself constitute a report of the violation of the law. You have not explained, nor is it apparent from the contents of Exhibit F, how the informer's privilege applies to these records. Consequently, you have not met your burden in demonstrating how these documents are excepted from public disclosure.

We note, however, that Exhibit F contains a small amount of criminal history information relating to the subjects of the reports. Criminal history information is protected under section 552.101. Federal regulations prohibit Texas agencies from releasing information received from the National Crime Information Center. See Open Records Decision No. 565 (1990) at 10-12. Information obtained from the Texas Crime Information Center ("TCIC") may be released under the Open Records Act only to the subject of the criminal history search or his or her representative pursuant to a written request in compliance with section 552.229 of the Government Code. *Id.* Because no such request has been made here, the department must also withhold the TCIC criminal history records pursuant to section 552.101. The remaining portions of Exhibit F must be released.

Exhibit G consists of a series of checks and vouchers obtained from the Austin Police Department's Organized Crime Unit. These checks and vouchers, written in 1983, contain information indicating the disbursement of funds from the organized crime unit, *i.e.*, the amount of money disbursed, to whom the money was disbursed, the date of disbursement, and the name of the individual that authorized the disbursement. You seek to withhold these records for the same reasons you sought to withhold Exhibit F above, and for the same reasons we dismiss those particular arguments.

You also contend that the "[r]elease of a document indicating the payment of money by law enforcement to an individual, even after this period of time, could not only endanger the safety and well being of that individual but also eliminate that individual as a source of future information." It is not apparent from a review of these records that such would be the case. For example, you do not argue that any of the individuals named in the

checks and vouchers are still employed by the crime unit or what capacity they served in the unit, *e.g.*, undercover officer, confidential informant, etc. Absent a detailed explanation as to why each of these individuals' names should not be released to the public more than ten years after these documents were created, we find that you have not met your burden in demonstrating the applicability of section 552.108.

Exhibit H<sup>4</sup> is an audio tape recording created during the bureau's investigation of the Travis County District Attorney's Office. This recording was conducted by the bureau and as such should be considered property of the bureau. Accordingly, the department must withhold Exhibit H pursuant to section 552.101. See discussion of Exhibit E *supra*.

You characterize Exhibit I as "a letter and confidential intelligence report" on an individual who "was the subject of a recent criminal prosecution in federal court." You explain that the prosecution of this individual resulted in a hung jury, but that the case has not been dismissed, and that retrial is "presently under consideration by the U.S. Attorney's Office." Although you contend that the release of Exhibit I would adversely affect this prosecution, you have not explained or otherwise demonstrated the extent to which this document relates to the current prosecution. Because you have not met your burden in demonstrating why these records should be withheld, the department must release Exhibit I in its entirety.

Exhibit J is a one page Texas Ranger report concerning the investigation of an as yet unsolved murder. The report reveals details of the investigation as well as discussing possible suspects. Where the statute of limitations on a crime has not expired and an investigation will again be actively pursued if new information comes to light, details of a investigation of that crime may be withheld pursuant to section 552.108. See Open Records Decision No. 408 (1984). This office agrees that the department may withhold Exhibit J pursuant to section 552.108.

Exhibits K and L consist of copies of audio taped conversations that the department recorded during the course of its investigation of the Travis County District Attorney's Office and other related documents. You seek to withhold these records to protect the common-law privacy interests of individuals identified in the records. Although you do not cite a specific exception under the Open Records Act, we will construe your arguments as raising section 552.102 because all of the individuals named in the recordings were public servants at the time the recordings were made.

Section 552.102(a) of the Government Code protects

information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental

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<sup>4</sup>This exhibit was erroneously labeled "I."

body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.

The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101: to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.). The information at issue pertains solely to individuals' actions as public servants, and as such cannot be deemed to be outside the realm of public interest. *See, e.g.*, Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). Section 552.102 was not intended to protect the type of information at issue here. The department must release Exhibits K and L in their entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Rick Gilpin  
Assistant Attorney General  
Open Government Section

RG/RWP/rho

Ref.: ID#s 23261, 23289, 23464  
23465, 23677, 23709,  
23973, 23975, 23976,  
23999, 24000, 24101,  
24021, 24114

Enclosures: Marked documents

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